14981

NO. ~~14781~~

United States
COURT OF APPEALS
for the Ninth Circuit

H. R. OSLUND,

Appellent,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., a corporation,

Appellee.

APPELLANT'S BRIEF

Appeal from Final Judgment of the United States District Court for the District of Oregon

HON. WILLIAM G. EAST, Judge.

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INDEX

INDEX OF CASES

TABLE OF AUTHORITIES CITED

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JURISDICTION

Jurisdiction of the action in the District Court properly attached because the pre-trial order (Tr. 3) alleged diversity of citizenship and amount in controversy under 28 U.S.C.A. Section 1332.

Final judgment in the case, was entered September 28, 1955 (Tr. 14), a motion for new trial was filed October 7, 1955 (Tr. 16), and an order entered October 17, 1955 (Tr. 19), denying motion for new trial. An

appeal was filed November 14, 1955 (Tr. 20). The appeal has been taken in time under Rule 73 (a) F.R.C.P. This court has jurisdiction of the appeal under 28 U.S.C.A. Section 1291.

STATEMENT OF THE CASE

The appellant, H. R. Oslund recovered a judgment against A. L. Brock in the sum of $19,685.00 for personal injuries arising out of an automobile accident in the State of Oregon on May 22, 1953. At the time of the accident A. L. Brock was operating an automobile belonging to Robert H. Lafky. The appellee carried an automobile liability policy of insurance upon the automobile in the sum of $10,000 and Robert H. Lafky was the named insured. An action was instituted by the appellant under the omnibus clause of the insurance policy against the appellee on December 2, 1954, in the District Court of Oregon. The appellee claimed that the said A. L. Brock failed to forward suit papers in the original action of Oslund vs. Brock and that the accident arose out of the operation of a garage within the meaning of an exclusion clause of the policy. The appellant claimed that the appellee denied coverage on the grounds that the accident arose out of the operation of a garage thereby excusing the failure of A. L. Brock to forward suit papers.

A brief statement of the undisputed facts at this point may help the court to fully understand the case and the issues involved. A. L. Brock owns and operates a small one man garage near Hillsboro, a small surburb

f the City of Portland, Oregon. He and Robert H. afky have been close personal friends for sometime nd have driven each others automobile on various ccasions. On the early morning of the accident Robert . Lafky had left his automobile with A. L. Brock for minor tune up. In the early morning A. L. Brock ompleted the minor tune up. About 2:30 in the after- oon he closed his repair shop and took the Lafky car o go out into the country and get some eggs. On his ay back to the garage he had the accident. Previous o this action, appellant had sued Girard Insurance Co., n state court). Girard who had insured A. L. Brock's rivate car defended under a garage exclusion clause. ppellant recovered judgment in the sum of $5,000.00 hich had been applied on the $19,685.00 judgment.

Two issues of fact were raised in the trial of this ase: (1) Did the appellee deny coverage on the grounds iat the accident arose out of the operation of a garage nd thereby excuse A. L. Brock's failure to forward rocess; (2) Did the accident arise out of the operation a garage within the meaning of the policy's exclusion?

The jury returned a general verdict for the defendant nd a special finding, to-wit:

> "Was A. L. Brock at the time of the accident using Mr. Robert H. Lafky's automobile in course of his business as a garage mechanic: *Yes.*"

The appellant filed a motion for a new trial alleging iat the jury's verdict was against the clear weight of ie evidence (Tr. 16), hence the first issue of law raised "Is there substantial evidence to support the verdict pon the two issues of fact presented."

It was the appellee's theory presented by the trial court's instruction to the jury that at the time of the accident, A. L. Brock was testing the automobile, hence the accident arose out of the operation of the garage. Appellant claims that the only evidence that the car was being tested at the time of the accident was the statement of defendant's exhibit 7 (on pre-trial plaintiff's exhibit 8), the accident report of the witness Robert H. Lafky which was received despite objections of the appellant that it was inadmissible. Appellant raised the further issue in his motion for new trial that exhibit 7 was not substantive evidence if properly admitted as impeachment of witness, Robert H. Lafky of alleged fact that A. L. Brock was testing the automobile at the time of the accident (Tr. 47).

Appellant contends that the defense counsel in arguing the case to the jury went outside the record and claimed as proven facts matters which interjected into the case the prejudicial issue that A. L. Brock was trying to manufacture insurance where there was none.

Specifically appellee's counsel claimed the record proved that A. L. Brock had had a garage policy which had lapsed, that Brock knew it had lapsed, that the appellee's policy did not cover and that Brock's attorney, Mr. Brink had thoroughly informed him of this (Tr. 26). Appellant claims the record does not sustain appellee's counsel's claim. The issue of counsel's improper remarks was raised by objection to them (Tr. 26). The court in effect overruled appellant's objections and the court's error was raised by appellant's motion for new trial (Tr. 16).

Appellant also raised issue of correctness of instructions of court by taking exception (Tr. 11, 72) and also by motion for new trial as will be discussed later (Tr. 16).

STATEMENT OF APPELLANT'S SPECIFICATION OF ERROR

(1) That the general verdict for the defendant and against the plaintiff and the special interrogatory are against the clear weight of the evidence in that it conclusively appears from the evidence that the defendant knew of the suit and denied coverage; and that there was no substantial evidence that the accident arose out of the operation of a garage.

(2) That the Court erred in admitting defendant's exhibit 7 over the objection of the plaintiff.

At the trial of the case, the appellant's counsel objected to the introduction of appellee's exhibit 7 as follows:

> "MR. GARDNER: If it please the Court, I would object to the introduction to this on the grounds that there is no basis laid for it. I can't see that it's relevant to the witness' testimony and I don't know whether they are claiming it for impeachment purposes or not." (Tr. 48)

Appellee's counsel then claimed:

> "MR. VERGEER:: If the Court will examine the document it relates to the conversation and has a bearing upon the conversation between Mr. Brock, the garage man, and Mr. Lafky, and he has testified concerning that conversation and this is further evidence on what the conversation was." (Tr. 48)

Exhibit 7, was the accident report filed May 23, 1953, approximately one and one-half hours after the accident by Robert H. Lafky, with the appellee. Not all of the questions were answered. The report contained question, "Describe how accident or loss occurred." The answer written by appellee's agent and signed by witness, Robert H. Lafky, (not a party to any law suit) said, "I had taken my car to the garage for motor work—in testing car garage owner wrecked it." (Tr. 49)

(3) That there was no substantial evidence that the accident arose out of the operation of a garage and the appellee's exhibit 7 was not substantial evidence, hence the court erred in failing to withdraw said defense from the consideration of the jury.

(4) That the court erred in giving appellee's instruction to the effect that the appellee must have "definitely denied" coverage and that a mere statement of opinion on the part of a representative of the insurance company was not enough to justify a finding that the company had refused coverage, was highly prejudicial to the plaintiff and did not correctly state the law.

> "In determining whether or not the insurance company did deny coverage to Mr. Brock it is not enough for you to find that a question of fact admittedly existed between Mr. Brink who was the attorney for Mr. Brock and Mr. Engel the adjuster. As to the use which was being made of the Chrysler automobile at the time of the accident, the mere statement of opinion on the part of the representative of the insurance company is not enough to justify a finding that the company refused coverage. Unless coverage or liability was definitely denied to Mr. Brock by the insurance company at the time prior

to the filing of the action by Mr. Oslund your verdict in the case must be for the defendant. If, on the other hand you find from a preponderance of all of the evidence in the case that the defendant did, acting through its agent, Mr. Engel, definitely deny any liability under the policy to Mr. A. L. Brock during the time of the discussions referred to in the evidence then you should consider the second phase of this case, the second phase being the second question which is raised by the contention of these parties, namely, was the automobile being operated in the course of the operation and management of a garage business." (Tr. 63, 64)

That the above instruction was one given by the ɔurt. That appellant excepted to said instruction as llows:

"MR. COSGROVE: Your Honor, the plaintiff will except to the Court's giving of the Defendant's Requested Instruction which begins 'In determining whether the insurance company denied coverage to Mr. Brock it is not enough for you to find that a question of fact admittedly,' and so forth——

THE COURT: Yes.

MR. COSGROVE: ——on the grounds and for the reason that the instruction is argumentative and on the further ground that it does not correctly state the law in that the word 'denied' is preceded by the word 'definitely' and that the law clearly with respect to waiver is that it may be even from conduct. The word 'definitely' makes the instruction argumentative and imposes a burden of proof upon the plaintiff it should not have to sustain." (Tr. 70)

(5) That the court erred in failing to give plaintiff's ɥuested instruction no. 1. That it clearly stated the w and was material to the exclusion defense raised by e defendant and the Court's failure to give it, prejuced the plaintiff.

That the exception was to failure to give appellant's equested instruction No. 1 which was as follows:

> "Since the insurance policy in this case was prepared by the defendant State Farm Insurance Company, its terms are to be construed most strongly against said defendant and in favor of the plaintiff." (Tr. 11)

That appellant excepted to failure to give said instructions as follows:

> "MR. COSGRAVE: All right. The plaintiff would except to the Court's failure to give Plaintiff's Requested Instruction Number 1; the failure to give Plaintiff's Requested Instruction Number 9, Number 13, particularly in view of the Court's using the word 'definitely'; and Instruction Number 14 with respect to estoppel." (Tr. 72)

(6) That the defense counsel made the following tatement to the jury, to-wit:

> "Mr. Brock was keenly aware of the fact that he was a garage operator and that he had no longer any garage liability coverage. The record shows that his policy had lapsed and he knew about it and he also knew that policy such as this would not be applicable to him. Undoubtedly Mr. Brink had informed him thoroughly on the subject but that is outside of the record. Now there was a discussion between Mr. Engel and Mr. Brink——" (Objection) (Tr. 26)

There was no evidence in the case to sustain the tatement. That it imputed bad faith to Mr. Brock and mplied that he was attempting to get coverage which ıe, in fact, knew he did not have. That the statement vas prejudicial, and prevented the plaintiff from obtaining a fair trial.

(7) The court erred in failing to sustain plaintiff's ›jection to defense counsel's misstatement and the urt erred in failing to instruct the jury to disregard it.

ARGUMENT OF CASE

This is an action upon an automobile liability policy der the omnibus clause. The appellant recovered a dgment in the sum of $19,685.00 for damages arising t of an automobile accident. The judgment was against L. Brock, the driver who was driving an automobile ned by Robert H. Lafky, who was insured as well all other persons driving with his actual permission ainst injuries arising out of the negligence of the iver. A. L. Brock was driving with the actual permis-n of Robert H. Lafky. The appellee claimed that it as not served with process. The appellant claimed that pellee denied liability contending that the accident ›se out of the operation of the garage, hence there was duty to serve appellee with process. The appellee sed the separate defense at trial that the accident ›se out of the operation of a garage, hence any liability their part because of A. L. Brock's negligence was cluded by the garage exclusion contained in the policy.

Point I

There is no substantial evidence to support the ver-ct.

a—The evidence conclusively established that the fendant between the date of the accident and Septem-r 25, 1953, five months before trial, denied coverage

on the grounds the accident arose out of the operation of a garage.

b—Denial of coverage excuses non-compliance with conditions precedent contained in the policy.

Hahn v. Guardian Assurance Co., 23 Ore. 576, 32 Pac. 683.
American Auto Ins. v. Castle et al., 48 Fed. (2d) 523.
Watson v. Pacific Mutual Life Ins. Co., 144 Ore. 413, 21 P. (2d) 201, 25 P. (2d) 162.

c—The burden of proof to prove that an accident is within the meaning of the exclusion clause of the policy is upon the insurer.

Bridal Veil Lumber Co. v. Pacific Coast Casualty Co., 75 Ore. 57, 145 Pac. 671.
29 Am. Jur., Insurance, Sec. 1444.

d—Ambiguity in the contract of insurance is to be construed against the insurer.

Rossier v. Union Auto, Ins. Co., 134 Or. 211, 297 Pac. 498.
Zimmerman v. Union Auto. Ins. Co., 133 Or. 600, 291 Pac. 495.
Nugent v. Union Auto. Ins. Co., 140 Or. 61, 13 Pac. (2d) 343.

e—Evidence offered for impeachment cannot be used as substantive evidence.

State v. Jarvis, 18 Ore. 360, 26 Pac. 302, 23 Am. St. Rep. 141.
Schluter v. Niagara Fire Ins. Co., 124 Ore. 560, 264 Pac. 859.
In re Lambert's Estate, Gourley v. Tate, 166 Ore. 529, 114 Pac. (2d) 125.
58 Am. Jur., Witnesses, Section 770.

The ony issues in this case defined for the court prior the submission of the cause to the jury were:

Did the defendant, State Farm Mutual Automobile surance Company, deny coverage to A. L. Brock, iver of the automobile owned by Robert Lafky under e policy issued to Lafky, and was this denial of cover- e a waiver or estoppel obviating the necessity of the aintiff or Brock to serve suit papers on the defendant?

The uncontradicted evidence on this point is as llows:

1—The Home Claims Committee of the State Farm utual Automobile Insurance Company denied cover- e prior to the 25th day of September, 1953. Plaintiff's hibit "14". This was in answer to interrogatories made company (Tr. 24).

2—This fact was re-affirmed in plaintiff's exhibit 2", dated 10/29/53 (Tr. 24).

3—Witness Ed Engel, Adjuster for State Farm Mu- al Automobile Insurance Company testified that on first meeting with Brock's attorney, he told him in opinion there was no coverage (Tr. 100), that this s told Mr. Brink after a discussion with the defend- t's counsel, Harry Samuels, as shown in plaintiff's hibit "11" (Tr. 24), and an attempt to get a reserva- n of rights agreement (Tr. 102). Witness for the plain- , Mervin W. Brink testified that on the first meeting h Ed Engle, Mr. Engel told him the company was on the case and they would not cover (Tr. 78), how- r, this testimony was contradicted by Ed Engel, who

claims that he had told Brink, his authority to deny coverage was limited and that was merely his opinion (Tr. 100). However, the uncontradicted evidence shows that at the time of taking of the deposition of Brock in the original negligence action, according to witness Mervin W. Brink, Ed Engel was present at the taking of the deposition on 9-5-53 (Tr. 85). Deposition referred to, identified in examination of Brock by appellee (Tr. 85). The reported date September 25, 1953, plaintiff's exhibit 14, shows State Farm Home Claims Committee had denied coverage (Tr. 24).

Witness Mervin Brink testified that because of the statements to him by Engel, he did not serve the suit papers upon State Farm (Tr. 88, 89). The appellee had ample opportunity to defend but even Home Claims Committee denied coverage during this period.

We submit that the evidence on this issue is conclusive. The appellee denied coverage, hence performance by Brock was excused.

The second issue submitted to the jury was: Did the accident arise out of the operation of a garage?

The evidence on this point shows according to the witness A. L. Brock that he and Lafky had had a liberal use of each other's cars (Tr. 30). That on the morning of the accident Lafky left his car there for a slight motor tune up (Tr. 31), that he had tuned the car up around 9:30, he had made a road test of the car and put the same on his lot around 10:00 a.m. That about 2:00 p.m. he changed his clothes, got into Lafky's car and went down to see Ralph Thomison, a friend of his, to buy two

zen eggs. That on the way back, and prior to getting the shop where he was going to stop, the accident curred (Tr. 38). The fact that he was going to get gs was corroborated by the plaintiff's witness Ralph nomison (Tr. 92). The only evidence contrary to this as offered by the appellee State Farm by way of im-achment. The appellee offered exhibit "2", a state-ent taken May 27, 1953, in which Brock stated that he dn't test the car (Tr. 39). This was offered to impeach n but would not be substantive evidence. The only ner evidence that was offered by the appellee was the pellee's exhibit "7" (Tr. 49), which appellant claims as inadmissible (Tr. 48). Exhibit 7 was the accident port made shortly after the accident at the local agent the appellee (Tr. 56). It was made out by three differ-t persons and was signed by the witness Lafky. On it pears the phrase "I had taken my car to the garage a motor tune-up—in testing the car the garage owner ecked it." (Tr. 49)

In *Schulter vs. Niagara Fire Insurance Company, pra,* the owner of real property sought to reform a licy issued in favor of the vendor of a contract. The aintiff offered the testimony of Mr. Gitchell to prove at he should have had the policy issued in favor of plaintiff. Gitchell, at the trial, testified to the con-ary and the plaintiff introduced a letter which tended contradict the testimony offered at the trial. The urt said:

> "Gitchell was a witness for the plaintiff and practically contradicted these statements which he had made in a letter which was written after the fire

had happened and after he had ceased to be agent for the insurance company; and which was only introduced to contradict his statement upon the witness-stand, and which is not substantive evidence for the plaintiff in this case."

In *re Lambert's Estate, supra,* an appeal was taken rom an order admitting a will to probate. A subscribing vitness to the Will testified that the testator did not iave testamentary capacity. Proponents offered his ffidavit to the contrary. The Supreme Court said:

> "At most, the affidavit could be considered herein only upon the question of the credibility of Dr. Jenkins' testimony not as substantive proof of its contents. For these reasons, this affidavit does not in any wise strengthen proponent's affirmative showing upon the question of the testamentary capacity of the decedent Mr. Lambert."

Despite the fact that the only evidence in case that Brock was testing the car was appellee's exhibit 7, which ppellant contends was improperly admitted, the court nstructed the jury:

> "If, however, you find from a preponderance of all of the evidence in the case that Brock's purpose in driving the car at the time of the accident was for the purpose of making a road test following the repair or adjustment of the car in the course of his garage business or in any incidental use in connection with making such a road test that would necessarily be a part of the operation of his garage business then you are instructed that it would be your duty to return into Court a verdict for the defendant." (Tr. 67)

We submit that the instruction since it was based pon improperly received evidence magnified the origial error and as far as the jury was concerned gave it

e effect of being substantive evidence and made it pear to be relevant when it in fact wasn't even evi-ence of whether the car was being tested at the time the accident.

But assuming that there was sufficient evidence to ow that the car was being road tested at the time of the cident as well as being used by Brock to get eggs, the idence would be insufficient to sustain the verdict. The st according to cases of what is meant by the exclusion ause, "arising out of the operation of a garage," the st is:

Was the use at the time of the accident a natural d necessary incident of the operation of the garage d was the garage purpose the producing cause of the p; and not merely incidental to the producing cause the trip?

In *Employer's Mutual Casualty Co. v. Fed. Mut.* s. *Co.*, 213 F. (2d) 421, the president of a corporation erating a car dealer and garage establishment was ing a car covered by a policy with a garage exclusion ause, owned by an employee and used because the rporation's pickup was inoperative, on a trip to re-ir a stalled demonstrator borrowed from the corpora-on by the president's daughter. It was held that this as purely a personal trip and not necessarily connected th the garage operation so as to come within the exclu-on of the policy on that particular car, nor even "in nnection with" such operation so as to come within other policy which would cover operations "in con-ction with" the garage.

In *Barry v. Sill,* 253 N.W. 14, where the employee of garage borrowed a customer's car with his permission o take a pleasure trip, and a fellow employee requested he employee to pick up a part for the garage at his rip's destination, it was held that the evidence sustained he trial court's finding that the garage purpose was nerely incidental to the trip and was not the producing ause and that, therefore, the accident did not arise out f the operation of a garage or repair shop.

The burden of proving the accident arose out of the peration of the garage was upon the appellee. This it id not do.

We submit there is no substantial evidence to sus- ain the verdict.

Point II

That the court erred in admitting defendant's exhibit

Appellee's exhibit 7, the accident report made to ppellee was made not by A. L. Brock, but by appellee's wn insured Robert H. Lafky. He was called as a witness y the appellant and was asked:

> "When did you first learn of the accident?"
> "Some time in the afternoon of that day, I couldn't give you the exact time, when he (Brock) came down to the place where I was staying and told me about it." (Tr. 42)

Nothing more was asked on direct examination re- arding that conversation.

On cross-examination appelle asked:

"Q. I think you said you took the car to the garage that morning?

A. (Witness nods head.)

Q. To be worked on?

A. Yes.

Q. And, that thereafter Mr. Brock came and told you about the accident?

A. That's right.

Q. That was the afternoon some time?

A. Some time in the afternoon.

Q. Do you know whether Mr. Brock had seen his attorney before he came to see you?

A. I would have no way of knowing.

Q. Yes. He didn't tell you that he had, did he?

A. No.

Q. What did Mr. Brock tell you at that time when you had that conversation with him?

A. When he first came in and told me about the accident?

Q. Yes?

A. He just came in and I could see he was pretty well shaken up and he called me outside—I was standing there talking to three or four other men—and he called me outside and then he told me that he had banged up the car.

Q. Did he tell you what he was doing at the time?

A. No, sir; I can't remember that he told me exactly what he was doing.

Q. Did he tell you that he was testing it at the time?

A. No, he never did flatly tell me that he was testing the car. I know that somehow I got the idea, possibly, on an assumption of my own that he was ready to return the car to me at the time either that he was on the way to return it to me or that that was what he was doing. I don't believe he actually told me that.

Q. But, it was your impression after your conversation with him that that is what he had been doing?

A. That was just my impression, yes." (Tr. 46, 47)

The accident report, exhibit 7 was then offered and ppellant objected as follows:

> "If it please the Court, I would object to the introduction to this on the grounds that there is no basis laid for it. I can't see that it's relevant to the witness' testimony and I don't know whether they are claiming it for impeachment purposes or not." (Tr. 48)

Defense counsel claimed that:

> "If the Court will examine the document it relates to the conversation and has a bearing upon the conversation between Mr. Brock, the garage man, and Mr. Lafky, and he has testified concerning that conversation and this is further evidence on what the conversation was." (Tr. 49)

Was any basis laid for receiving it? It was not an dmission made by a party. Was there any testimony nking it to the conversation, Lafky had had with A. . Brock other than appellee's counsel's statement? In act the testimony elicited by the appellee shows that ne witness testified that Brock did not tell witness that e was testing the car at the time of the accident. How nen could it become relevant? The issue was whether Brock was testing the car at the time of the accident. Brock said he was not. Lafky said Brock did not tell im that he was. Hence how could an accident report aying Brock was testing the car signed by Lafky who id not know, be relevant? If it was impeaching evience as to Lafky's testimony it could not become subtantive evidence to substantiate the jury's verdict.

Point III

That there was no substantial evidence that the acci-
nt arose out of the operation of a garage and the de-
dant's exhibit 7 was not substantial evidence, hence
court erred in failing to withdraw said defense from
consideration of the jury.

Appellant submits that the failure of the trial court
withdraw the question of exclusion clause from the
y, standing alone would not be grounds for a reversal
the judgment appealed from because it was not prop-
y raised at the trial. However it was urged as a
ound for new trial in appellant's motion. The point is
sed on this appeal as an aggravation of the error al-
ed by the appellant in point II and point I. We will
discuss it further because we feel that its relation-
p to the case has been fully presented in the discus-
n of points I and II.

Point IV

That the Court erred in giving appellee's instruction:

> "Unless coverage or liability was *definitely denied* to Mr. Brock by the insurance company at the time prior to the filing of the action by Mr. Oslund, your verdict in the case must be for the defendant. If, on the other hand you find from a preponderance of all the evidence in the case that the defendant did, acting through its agent Mr. Engel, *definitely* deny any liability under the policy to Mr. A. L. Brock during the time of the discussions referred to in the evidence then you should consider the second phase of this case * * *" (Tr. 64)

Appellant contends that the instruction does not correctly state the law, in that no particular words are necessary nor is it necessary that the denial be in writing, nor is it necessary that the denial be prior to the commencement of the suit.

Point V

That the Court erred in failing to give appellant's requested instruction one, to-wit:

> "Since the insurance policy in this case was prepared by the defendant State Farm Insurance Company, its terms are to be construed most strongly against said defendant and in favor of the plaintiff." (Tr. 11)

The exclusion clause arising out of the operation of a garage is not free from ambiguity. The appellee wrote the contract and selected the risks it did not wish to insure.

The instruction correctly stated the law, the appellant was entitled to is, asked for it and the refusal to give it was prejudicial error.

Point VI

Appellee's counsel in argument to the jury claimed as having been proven by the evidence, matters which had not been proven, and which were not even issues in the case.

Appellee's counsel stated:

> "Mr. Brock was keenly aware of the fact that he was a garage operator and that he had no longer

any garage liability coverage. The record shows that his policy had lapsed and he knew about it and he also knew that a policy such as this would not be applicable to him. Undoubtedly Mr. Brink had informed him thoroughly on the subject but that is outside of the record. Now there was a discussion between Mr. Engel and Mr. Brink——" (Objection) (Tr. 26)

The major issue in the case was did the accident arise out of the operation of a garage. Appellant submits that the only evidence of insurance in the case is appellee's policy issued on the automobile driven by A. L. Brock and owned by Robert H. Lafky, the named insured. Said policy contains the garage exclusion. The only other insurance disclosed by the record is in the pre-trial order, agreed facts. They disclose that Loyalty Group Insurance Company (Girard Insurance Co. is part of Loyalty Group) insured A. L. Brock in the sum of $5,000.00. The record further discloses that prior to this action appellant recovered after jury trial judgment against Loyalty Group Insurance in the sum of $5,000.00 which sum was applied as partial payment against the $19,685.00 against Brock. This is the same judgment which gives appellant cause of action against appellee on its policy. If Loyalty Group Insurance Company policy were a garage keeper's policy isn't it reasonable to assume appellee would have raised appellant's recovery there as an estoppel here. In other words would it be possible for the same appellant to recover on the same judgment on the same accident on a garage keeper's policy and a policy with a garage keeper's exclusion? From this evidence the court may conclude

that Loyalty Group's policy also had a garage exclusion. Had appellee raised issue in trial that A. L. Brock's policy had lapsed and that he knew that appellee's policy would not cover him, appellant could have introduced the pleadings of the case against Loyalty Group.

If it were true or if there were evidence in this case that Brock once had a garage liability policy and let it lapse and hence at the time of the accident was keenly aware that he had no garage liability coverage and if the jury believed that the record in this case established that, wouldn't the jury be inclined to feel a little ill will toward Brock for in effect driving without insurance. And if the record as appellee's counsel claimed (and we submit does not) showed that Brock knew that appellee's policy did not apply to him, and particular if as appellee's counsel claimed, but which the record does not sustain, that Brock's counsel had thoroughly informed him on the subject, would not the jury be highly indignant and refuse to make the appellee pay Brock's just judgment to the appellant.

At this point in appellee's counsel's argument to the jury appellant objected.

What did appellee's counsel say, did he admit that he was outside of the record on pre-judicial matters.

He said, "I believe the matter (insurance lapsing) was mentioned by a witness." (Tr. 26)

Point VII

The court erred in failing to sustain appellant's objection to appellee's counsel's misstatement and the court erred in failing to instruct the jury to disregard it.

Then what happened? The court had the following part of appellee's counsel's improper argument re-read to the jury:

> "The record shows that his policy had lapsed and he knew about it and he also knew that a policy such as this would not be applicable to him. Undoubtedly Mr. Brink had informed him thoroughly on the subject but that's outside of the record. Now, then, there was a discussion between Mr. Engel and Mr. Brink——" (Tr. 26)

Did the court ask the jury to disregard the remark that they were outside the evidence and not to be considered, or that Brock had a policy and appellant sued on it and a jury heard the case and gave appellant judgment.

The court said:

> "There was some evidence in the case to the effect that Mr. Brock had insurance of his own and counsel can draw such inferences from that evidence as they desire. The jury understands that counsel is merely drawing his inference and analysis of the evidence." (Tr. 26)

At this point did the jury understand that there was *no evidence* of a garage policy, that there was *no evidence* that Brock had once had a garage liability insurance coverage but that it had lapsed and that he knew that it had lapsed? Did the jury understand that there

was *no evidence* that Brock knew that a policy such as the appellee's would not be applicable to him? Did the jury understand that there was *no evidence* his attorney Mr. Brink had informed him thoroughly on the subject?

At this point did the jury understand that appellee and appellant had agreed by pre-trial order that Loyalty Group Insurance Company had been sued by appellant on their policy. The same policy the trial judge referred to:

> "There was some evidence to the effect that Mr. Brock had insurance of his own" (Tr. 26).

That another jury had awarded a judgment against the other insurance company on the same type of exclusion clause.

If the jury did not so understand can the appellate court say appellant had a fair trial. That the trial judge did not commit prejudicial error. The motion for new trial (Tr. 16) discloses this matter was brought to his attention. His comments on denying motion for new trial do not disclose that he even considered it (Tr. 111).

Improper argument of counsel constitutes reversible error.

In *Zimmerle v. Childers,* 1913, 67 Ore. 465 (136 Pac. 349), the plaintiff sued the sheriff to replevin property sold under execution claiming that the plaintiff was the owner under a bill of sale executed prior to the writ. Plaintiff's counsel in argument claimed the bill of sale had been recorded, that judgment debtor though not a

party was the real party in interest and that the bill of sale having been recorded was evidence to all the world of plaintiff's good faith and that the sheriff had a bond to cover such wrongful sales. There was no evidence that the bill of sale had been recorded.

The court said:

"The trial of a hotly contested lawsuit is a battle, and able lawyers with good intentions sometimes, out of zeal for their client's success, overstep the lawful bounds of their privileges, as counsel, to the injury of the opposite party. When they do so, it is the duty of the trial courts to stop them and constrain them to keep within the limits of their privileges. When objections are made to improper remarks by counsel, in their addresses to juries, and the courts overrule the objections, and permit counsel to go on with improper statements, such action is reversible error, unless it can be seen by the appellate court that the adverse party was not injured by such remarks.

"As a general rule, counsel in argument must confine themselves to the facts brought in evidence. Thus, it is error, and cause for a new trial to permit counsel, over proper objections and exceptions, to state and comment upon facts pertinent to the issue, but not in evidence. So it is improper for counsel to refer to facts not pertinent to the issue, but calculated to prejudice the case to the injury of the opposite party."

The court further said:

"The remarks of the plaintiff's counsel, over the objection and exception of the defendant, concerning the pretended recording of said bill of sale, were error, also. Trial courts are clothed with ample power to prevent counsel's arguing to jurors matters not within the issues, or not within the evidence, and they should not hesitate to use this power, and thus safeguard the rights of litigants."

In *New York C. R. Co. v. Johnson,* 279 U.S. 310, 73 L. Ed. 706, 49 S. Ct. 300, the plaintiff sued and recovered for personal injuries. On cross-examination defense counsel brought out fact that plaintiff's doctors gave treatment usually given for syphillis. He asked other questions to show, had favorable answers been received that she might have had syphillis. The answers given showed that she did not. On closing argument defense counsel disclaimed any belief she had syphillis and any purpose to show that she had the disease. Plaintiff's counsel argued.

> "Gentlemen of the jury, they would charge her with a disease which would brand her as bad as a leper and exclude her from the society of decent people. That is the kind of a defense that is in this case, and I resent it. I resent the New York Central coming into this town and saying that that girl has the syphilis and trying to make this jury believe that she has the syphilis.
>
> "She will be a misery to herself; every time she attempts to take a step and is unable to do so, she suffers mental anguish; every time she sees people watching her, and knowing what she is doing, she suffers mental anguish. And gentlemen, it is sought to say that that is the result of syphilis. Syphilis, one of the most—the worst disease that is known in human history; a disease that can never be freed from the body; a disease that is worse than leprosy. That is the defense in this case. And, gentlemen, with not one, not one scintilla of evidence in this case to justify it."

The Circuit Court of Appeals reversed judgment and plaintiff obtained writ of certiorari.

The Supreme Court held that plaintiff's argument not sustained by evidence. But Supreme Court of United

States apparently rested their decision in reversing judgment and granting new trial upon different grounds than the Circuit Court. And in effect said the defendant had a right to show by cross-examination that injuries did not result from the accident but could have resulted from syphilis. But since the evidence disclosed that they did not, it was error to argue that evidence disclosed a purpose on the part of the defense counsel to defame injured person, since that was not an issue.

The Supreme Court did say:

> "The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. See Union P. R. Co. v. Field, 69 C.C.A. 536, 137 Fed. 14, 15; Brown v. Swineford, 44 Wis. 282, 293, 28 Am. Rep. 582. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. Brasfield v. United States, 272 U.S. 448, 450, 71 L. Ed. 345, 346, 47 Sup. Ct. Rep. 135."

Appellant contends it was reversible error for appellee's counsel to argue and for trial court to allow argument of matters not in issue, i.e. alleged lapse of insurance, alleged knowledge of Brock that appellee's policy did not cover him, alleged briefing by Brock's attorney before interview by appellee's agent that appellee's policy did not cover him and implication that Brock was trying to create insurance coverage on the part of appellee

where none existed. Appellant reiterates these matters contended as fact by appellee in closing argument were not issues, and were not sustained by evidence and prevented appellant from having a fair trial.

Judge Learned Hand aptly summarized the problem in Brown v. Walter, 62 F. 2d 798:

> "He argued with much warmth that the whole defense had been fabricated by the insurer—transparently veiled by such provocative phrases as an 'unseen hand,' and an 'unseen force,' and the like. This had not the slightest support in the evidence; it was unfair to the last degree. Nobody can read the summation without being satisfied that the real issues were being suppressed, and the picture substituted of an alien and malevolent corporation, lurking in the background and contriving perjurious defense. A judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary. It is not always enough that the other side does not protest; often the protest will only serve to emphasize the evil. Justice does not depend upon legal dialectics so much as upon the atmosphere of the court room, and that in the end depends primarily upon the judge."

CONCLUSION

Appellant concludes that the admissible evidence does not sustain the verdict. That the improper remarks of appellee's counsel and the failure of the trial court to strike them or attempt to offset them necessitates a new trial.

Respectfully submitted,

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